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# Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically

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# Looking Down the Road Less Traveled<sup>1</sup>: Challenges to Persuading the Legal Profession to Define Problems More Humanistically

Nancy A. Welsh\*

## I. INTRODUCTION

Last year, on the last day of Civil Procedure, my students and I did something we always do. We reflected on what they had learned about the Federal Rules of Civil Procedure, jurisdiction, and other issues peculiar to the course. We also talked a bit about their progress in learning to think like lawyers. With the help of a PowerPoint slide, I reminded them of the particular goals I had established on the first day of classes. I wanted my students to be able to:

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1. With apologies to Robert Frost:  
Two roads diverged in a yellow wood,  
And sorry I could not travel both  
And be one traveler, long I stood  
And looked down one as far as I could  
To where it bent in the undergrowth;  
Then took the other, as just as fair,  
And having perhaps the better claim,  
Because it was grassy and wanted wear,  
Though as for that, the passing there  
Had worn them really about the same,  
And both that morning equally lay  
In leaves no step had trodden black.  
Oh, I kept the first for another day!  
Yet knowing how way leads on to way,  
I doubted if I should ever come back.  
I shall be telling this with a sigh  
Somewhere ages and ages hence:  
Two roads diverged in a wood, and I—  
I took the one less traveled by,  
And that has made all the difference.

ROBERT FROST, *The Road Not Taken*, in *THE POETRY OF ROBERT FROST* 105, 105 (Edward Connery Lathem ed., Vintage 2001) (1936).

\* Professor of Law, The Dickinson School of Law of Penn State University. My thanks to my friend and colleague, Leonard Riskin, whose writing has helped me see forks in the road and whose wise counsel has helped me explore those roads, and Julie Macfarlane, who counsels patience and recognition of the glass half-full. Many thanks also to Bobbi McAdoo, John Lande, Jean Sternlight and Andrea Schneider for their comments on earlier drafts of this Essay. Additional thanks to the University of Missouri-Columbia for inviting me to participate in the symposia honoring Leonard Riskin and examining innovative lawyers. This Essay is based on my remarks at the symposium honoring Leonard Riskin. I am grateful to Travis White and Frank Pyle for their outstanding research assistance. Finally, thanks to my husband, Eric Munck, and my children who constantly must accommodate my refusal to recognize the limitations of being but “one traveler.”

- Closely analyze the relevant language of rules and statutes
- Closely analyze case law to understand what particular questions (issues) were decided, why such questions were decided as they were, and what rules of interpretation emerge
- Apply the rules and statutes—as interpreted by courts—to new sets of facts
- Use the rules, statutes, case law and underlying policies to argue different positions

This is my normal practice as I prepare to send my first-year, first-semester students on to the next stage of law school. I suspect that many law professors share similar goals with their students.

But then, I changed the routine and put up a slide my students had not seen before. It described a new goal that I recently realized I had for them:

**A New Goal: Start to “Feel” Like a Lawyer**

- Understand profession as service, with human and ethical obligations to clients, society, and the aspiration of achieving justice. How we use the rules and the privilege of being a lawyer *matters*.
- Learn how to balance these professional obligations with the desire to succeed.
- Learn how to balance professional obligations, desire for success *and* maintenance of yourself as a healthy, caring person.

I know that despite my bulleted points, the idea of feeling like a lawyer is fairly nebulous. I also suspect that the idea of feeling like a lawyer could be perceived as foreign, even threatening. Last, I worry that in bifurcating thinking and feeling, I am both creating a false divide and inviting the prioritization of one over the other.

But within the last few years—as I have read about the involvement of lawyers in corporate scandals,<sup>2</sup> decisions to torture human beings,<sup>3</sup> even the gaming of law school rankings<sup>4</sup>—I have come to believe that while we law professors must continue to emphasize the discipline of *thinking* like a lawyer as described above, we must also begin to reach out to our students’ hearts and souls and initiate our students into the challenging discipline of *feeling* like lawyers. For me,

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2. See Tom Fowler, *Another Act in the Enron Show: Filing in massive shareholder suit to take aim at Vinson & Elkins*, HOUSTON CHRONICLE, June 13, 2006, at Business Section (reporting accusations Enron lawyers gave false opinions, filed false reports, and structured biased transactions while claiming independence); Damon Darlin & Matt Richtel, *Chairwoman Leaves Hewlett in Spying Furor*, N.Y. TIMES, September 23, 2006, at A1 (reporting that senior counsel of Hewlett-Packard had to resign due to leak investigation scandal).

3. See Neil A. Lewis & Eric Schmitt, *The Reach of War: Legal Opinions; Lawyers Decided Bans on Torture Didn’t Bind Bush*, N.Y. TIMES, June 8, 2004, at A1 (reporting on memo written by a team of lawyers advising President Bush that he was not bound by international or federal law that banned torture).

4. See Jane Easter Bahls, *The Ranking Game*, 31 STUDENT LAWYER 7 (March 2003), reprinted at <http://www.abanet.org/lstd/stulawyer/mar03/rankinggame.html>; Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., September 24, 2007, at A1 (reporting that one school’s employment figures were based on data from only 24% of their graduating class and that another school included temporary attorneys in its count of graduates working for firms of 100 or more lawyers).

that means enabling lawyers and law students to appreciate and manage the human connections and moral obligations—and, yes, the tensions, sacrifices, and excitement—that accompany the privilege of serving as lawyers in the United States of America.<sup>5</sup> Choosing to join the legal profession is a calling, at least to some degree. It is not just about logic or accumulating money, power, and prestige.<sup>6</sup>

Obviously, I am not the only law professor thinking (and feeling) my way through these issues. The Carnegie Foundation for the Advancement of Teaching is making a powerful call for law schools to introduce programs and revise their curricula in order to integrate the cognitive skills of legal analysis, the humanistic skills of client service, and the internalization of the identity and moral values of civic professionals.<sup>7</sup> The Clinical Legal Education Association similarly has developed recommendations for law schools to improve graduates' preparation for practice, in terms of both skills and professionalism.<sup>8</sup> A significant number of law schools and legal academics are concerned about the current "crisis of professionalism" characterized by "a decline of civility and an increase in adversarialism, a decline in the role of the counselor and in lawyers' competence, including ethical competence, and a new sense of the law as a business, subject to greater competitive economic pressures and answerable only to the bottom line."<sup>9</sup>

But why am I writing about this topic as part of a symposium on innovative lawyering? It strikes me that many of the lawyers and legal academics attracted to mediation and other client-oriented experiments with the practice of law—people like myself—have struggled with the limitations of the one-dimensional world view that often accompanies learning to "think like a lawyer." In addition to embracing the discipline of rigorous legal argument, many of us have sought the human side of the law and creative, healing connections. Enthusiastic converts to the mediation cause, some of us have successfully advocated for the institutionalization of the process in the courts in order to make space within litigation for collaborative dialogue and solutions.

Early on, we received warnings that even though we might win this battle, we were likely to lose the war. Professor Leonard Riskin wrote of the uneasy fit between a holistic vision of mediation and the legal and monetary focus of the lawyer's "philosophical map."<sup>10</sup> Later, with his "Grid for the Perplexed,"<sup>11</sup> Professor

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5. See e.g., Jonathan R. Cohen, *When People are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 798-99 (2001).

6. For that matter, I feel the same way about being a law professor.

7. See WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

8. See ROY STUCKEY, ET AL., *BEST PRACTICES IN LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007), available at [http://cleaweb.org/documents/Best\\_Practices\\_For\\_Legal\\_Education\\_7\\_x\\_10\\_pg\\_10\\_pt.pdf](http://cleaweb.org/documents/Best_Practices_For_Legal_Education_7_x_10_pg_10_pt.pdf).

9. SULLIVAN, COLBY, WELCH WEGNER, BOND & SHULMAN, *supra* note 7, at 136-37.

10. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-48 (1982).

11. See Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111, 111-14 (1994) [hereinafter Riskin, *Mediator Orientations*]; see generally Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (expanding upon the 1994 article) [hereinafter Riskin, *Grid*]. Professor Riskin originally referred to a mediator's "orientation," but has now abandoned that term. See Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 30 (2003) (noting that a grid

Riskin forced acknowledgement that mediation had taken a variety of forms and that many of the most successful court-connected mediators were employing the lawyer's philosophical map, rather than parties' underlying interests or emotions or values, to achieve settlement. Describing these mediators' focus as "narrow," Professor Riskin noted that they "assume[d] that the parties ha[d] come to them for help in solving a *technical* problem. The parties ha[d] defined this problem in advance through the positions they ha[d] asserted in negotiations or pleadings."<sup>12</sup> In other words, these mediators were thinking like lawyers—traditional lawyers. While Professor Riskin also identified mediators with a "broad orientation" who assumed that parties could "benefit if the mediation [went] beyond the narrow issues that normally define legal disputes[,] "<sup>13</sup> they were less likely to be found in court-connected non-family civil mediation sessions.

Empirical research has largely supported Professor Riskin's assertion that court-connected non-family civil mediation operates within the frame of litigation. The presence of lawyers, particularly litigators, seems to correlate strongly with this narrow focus.<sup>14</sup> Lawyers dominate the discussions in mediation. Lawyers select the mediators. Lawyers tend to select other lawyers as mediators. Lawyers also tend to select mediators who have substantive expertise in the type of case at issue.<sup>15</sup> Ultimately, lawyers indicate that they value mediation because it provides an opportunity for litigation-oriented reality testing that will produce settlement.<sup>16</sup> The mediator is expected to influence the parties through his/her evaluations—of the merits and weaknesses of the parties' claims and defenses, credibility of key players and documents at trial, likely costs of pursuing litigation, financial value of the case, and even the parties' sincerity in exploring settlement.<sup>17</sup>

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grounded on the idea of overall mediator orientation "excludes attention to many other issues in mediator behavior, obscures much about what mediators do, and ignores the role and influence of parties.").

12. Riskin, *Mediator Orientations* *supra* note 11, at 111.

13. *See id.*

14. *See, e.g.,* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 26-27 (2001) (citing Leonard Riskin, *The Represented Client in a Settlement Conference: the Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059, 1076-77 (1991)).

15. *See* Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 802-03 (2001) (citing to studies showing lawyers' domination of mediation sessions); Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 434 (2002); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 524 (2002).

16. *See* McAdoo, *supra* note 15, at 429 (2002) (reporting the top factors motivating lawyers to voluntarily choose mediation include saving litigation expenses (67.9%), making settlement more likely (57.4%), providing a needed reality check for opposing counsel or party (52.2%), and providing a needed reality check for own client (47.7%)). *See also*, Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 473 (2007) (concluding that lawyers see medical malpractice mediation as primarily their process to produce settlement and only incidentally to deal with parties' emotional or psychological issues); Kenneth P. Nolan, *Our Practice, It's A-Chaaangin'*, 33:2 LITIGATION 63, 65 (Winter 2007) ("Prepare written material, detailing both liability and damage information . . . . Bring your client to the mediation. Let them hear the weaknesses, how they could strike out. Let them voice their anger, grief. Involve them in the decision to say no thanks or to end the years of battle.").

17. Lawyers' litigation-focused embrace of mediation and mediators may be part of a larger trend as mediation is mainstreamed into major social institutions. In order to achieve "successful" mainstreaming in these institutions, the mediation process has generally adapted to reflect the goals, norms, problem definition and preferred outcomes of the repeat players. *See* Nancy A. Welsh, *Institutionali-*

Many law schools now have Alternative Dispute Resolution (ADR) programs or at least feature courses in negotiation, mediation, and client counseling.<sup>18</sup> Many if not all of these courses introduce students to the advantages of “interest-based” or “integrative” negotiation. This approach to negotiation encourages consideration of both legal and non-legal interests, including substantive interests, psychological interests, and procedural interests.<sup>19</sup> So why does court-connected mediation, often involving newer lawyers as representatives of their clients, still appear so unlikely to reflect a broader, more humanistic orientation to problem definition? Why do so few lawyers assist their clients with looking down the “road less traveled by”?

This essay will focus on three factors that may help to explain why it seems to be so difficult for many lawyers to escape the confines of a narrow, legalistic framing of issues—or more poetically, why they may be predisposed against looking down “the road less traveled by.” These factors should be taken into account as challenges to the widespread adoption of innovative, more humanistic approaches to lawyering. First, the essay will turn to research regarding the psyches and psychological needs of the people who choose to attend law school and become lawyers. Second, the essay will consider what is required from lawyers to sustain the autonomy and privileges of their profession. Third, the essay will examine the demands of the business of law. Finally, the essay will consider the potential role of legal education in helping lawyers to develop an integration of thinking and feeling like a lawyer.

## II. THE PSYCHES AND PSYCHOLOGICAL NEEDS OF LAW STUDENTS AND LAWYERS

Research reveals that law students (and thus future lawyers) have some unique psychological needs and characteristics that may help explain the persistent narrowness of lawyers’ definition of problems to be resolved.<sup>20</sup> Not surpri-

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zation and Professionalization, in *THE HANDBOOK OF DISPUTE RESOLUTION* 487-506 (Michael L. Moffitt & Robert C. Bordone eds., 2005); Howard Gadlin, *Bargaining in the Shadow of Management: Integrated Conflict Management Systems*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 371-85 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (expressing concerns that an understanding of conflict as inevitably wasteful has led to institutional adoption and cooptation of dispute resolution programs).

18. American Bar Association Directory on Dispute Resolution, <http://www.abanet.org/dispute/directory.html> (all 184 ABA approved law schools offer at least one course on ADR as of 2003, The most common courses offered include dispute resolution survey course, arbitration, mediation, and negotiation. One hundred forty-one schools offer a dispute resolution survey course. Fifty schools offer a course on arbitration. Seventy-nine schools offer a course on mediation. Eighty-seven schools offer a course in negotiation); Alternative Dispute Resolution Section of the Association of American Law Schools, [http://law.missouri.edu/aalsadr/ADR\\_programs.htm](http://law.missouri.edu/aalsadr/ADR_programs.htm) (listing forty-two law schools that offer ADR programs). See Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 688-89 (2005).

19. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 73-77 (2003).

20. See generally Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997).

singly, law students tend to have a strong focus on academics.<sup>21</sup> In addition, though, research has found that law students are generally characterized by a high need for dominance, leadership, and attention; they experience severe discomfort with feelings of inferiority.<sup>22</sup> Research also shows that though law students may have good social skills, most demonstrate a “low interest in emotions or others’ feelings.”<sup>23</sup> Perhaps consistent with this aversion to focusing on emotions or feelings, law students also are much more likely than the general population to gather information and make decisions based on general standards or rules, rather than relational values. (This last characteristic also has been shown to characterize most lawyers.<sup>24</sup>)

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21. *Id.* at 1349. See also, RONIT DINOVTZER, ET AL., AFTER THE J.D.: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 19 (2004) (75% of lawyers report graduating in top quarter of their undergraduate classes). Interestingly, though, the influential ranking of *U.S. News and World Report* focuses more attention on LSAT scores than on grades. Arguably, this should result in students who have a certain gift for and tendency toward logical thinking, but available data does not clearly make this point. See, e.g., David A. Thomas, *Predicting Law School Academic Performance from LSAT Scores and Undergraduate Grade Point Averages: A Comprehensive Study*, 35 ARIZ. ST. L.J. 1007 (2003) (containing a quantitative study), Kirsten A. Dauphinais, *Valuing and Nurturing Multiple Intelligences in Legal Education: A Paradigm Shift*, 11 WASH. & LEE RACE & ETH. ANC. L.J. 1 (2005) (discussing logical thinking in the context of LSAT scores). But high LSAT scores do not always correlate with the academic prowess demonstrated by high grades. On the other hand, research has shown that high LSAT scores are highly correlated with factors such as socioeconomic status and even zip code. See Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 601-02 (2001).

22. See Daicoff, *supra* note 20, at 1354 (1997). Research has also found that law students tend to come from an elite socio-economic background, which might explain the need for dominance as the need to protect privilege. *Id.* at 1354-55. But see DINOVTZER, ET AL., *supra* note 21, at 20 (2004) (observing that the newly admitted lawyers in its study “come generally from relatively privileged socioeconomic backgrounds” but also noting that “[f]ully 21% of respondents’ fathers and 28% of respondents’ mothers did not attend college; 15% of the fathers had blue-collar occupations, and 15% of respondents’ parents were born outside the United States . . . . The more selective the law school, the more likely it is to educate the children of relative privilege, and the less selective schools are notably more accessible to the less privileged students.”). See also, Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U.J. GENDER SOC. POL’Y & L. 511, 515 (2005) (reporting that female law students are more likely to identify altruism as a priority in choosing a career and also more likely to choose public interest jobs).

23. Daicoff, *supra* note 20, at 1350. A 1960 study found that law students’ early childhoods were characterized by “authoritarian male dominance, self-discipline, school achievement and reading.” *Id.* (citing Barbara Nachmann, *Childhood Experience and Vocational Choice in Law, Dentistry, and Social Work*, 7 J. COUNS. PSYCHOL. 243, 247-49 (1960)). Meanwhile, other research has shown that law students share: a tendency not to focus on emotions, a strong aversion to feelings of inferiority and tendencies toward isolation and excessive self-reliance. See LAWRENCE KRIEGER, *THE HIDDEN SOURCES OF LAW SCHOOL STRESS: AVOIDING THE MISTAKES THAT CREATE UNHAPPY AND UNPROFESSIONAL LAWYERS* 9-10 (2005). Correlation and causation are not synonymous, but it is tempting to hypothesize that these childhood and psychological characteristics, combined with the environment of law school and legal practice, may help to explain the greater likelihood of depression among law students and lawyers. See G. Andrew H. Benjamin, Alfred Kaszniak, Bruce Sales & Stephen B. Shanfield, *The Role of Legal Education in Producing Psychological Distress among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 250; Herbert N. Ramy, *Student depression becomes an issue of faculty concern*, 33:8 STUDENT LAWYER MAG., April 2005; Sue Shellenbarger, *Even Lawyers Get the Blues: Opening Up About Depression*, WALL ST. J., December 13, 2007, at D1.

24. See, Daicoff, *supra* note 20, at 1365-66; Vemellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 92 (1995-96); Chris Guthrie, *The Lawyer’s Philosophical Map and the Disputant’s Perceptual Map: Impediments to Facilitative Media-*

These needs and characteristics comprise the “typical” law student profile. This does not mean that *every* law student (and thus *every* future lawyer) fits the profile. In fact, there is research affirming that a hefty minority of law students do *not* fit this profile.<sup>25</sup> But the exceptions are also less likely to remain in law school and become lawyers.<sup>26</sup>

The psychological tendencies revealed by research should make it relatively unsurprising that the people who have chosen to enter the legal profession dominate mediation sessions and anchor any discussion of the issues in the application of litigation’s rules and standards, rather than in the emotional, psychological, or moral needs of the people in the room. For this psychological profile, feeling like a lawyer may mean feeling in control, central to the action, adept at finding the appropriate analytical box to fit an unruly reality. It is also likely to mean substantial discomfort at the prospect of risking a human connection with people in pain or trying to respond constructively to the confusing and uncomfortable emotions that are often part of litigation. Such discomfort is not irrational. The degree of the discomfort, however, may present a significant impediment to the adoption of innovations that are explicitly humanistic.

### III. THE REQUIREMENTS OF SUSTAINING A PROFESSION

As we assess law students’ and lawyers’ reluctance to frame problems to include their emotional, psychological, and moral elements, we also must consider lawyers’ understandable interest in sustaining their right to call themselves “professionals.”

Sociologists have found that professions are characterized by a unique, abstract body of knowledge as well as shared norms, education, and ethics that derive from and reinforce that knowledge base.<sup>27</sup> Professions also are granted important privileges. Among the most attractive are high status and autonomy (e.g., the right to engage in self-regulation). In the United States, certain professionals’ status also tends to be reflected in relatively high incomes.<sup>28</sup>

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*tion and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 157, n.64 (2001) (citing to several studies showing the predominance of a “thinking” orientation among law students and lawyers).

25. See Daicoff, *supra* note 20, at n.143 (observing that 72% of law students preferred Thinking over Feeling, which suggest that the remaining 28% preferred Feeling).

26. Humanist law students who tended to make decisions based on impacts on others had a drop-out rate of 20% compared to the 11% drop out rate for students who tended to make decisions through the use of logical calculation based on existing, definable standards. Daicoff, *supra* note 20, at n.148 (citing Paul VanR. Miller, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL EDUC. 460, 466 (1967)). Researchers have also found that the first group is less likely to experience satisfaction with their legal careers. See Susan J. Bell & Lawrence R. Richard, *Anatomy of a Lawyer: Personality and Long-Term Career Satisfaction*, in FULL DISCLOSURE: DO YOU REALLY WANT TO BE A LAWYER? 152-53 (Susan J. Bell ed., 2d ed. 1992).

27. Like the old question of whether the chicken or the egg came first, it is not clear whether a profession’s development of norms, education and ethics represents compliance with society’s expectations as the price to be paid for the privileges of professionalism or whether the grant of privileges resulted from individual members’ willingness to step up and voluntarily shoulder these responsibilities regardless of whether the privileges would follow.

28. According to the Bureau of Labor Statistics, attorneys earn an average income of \$113,660, significantly higher than \$46,326 that is reported by the Department of Commerce as the median United States Income. U.S. Department of Labor, Bureau of Labor Statistics, [http://www.bls.gov/oes/current/oes\\_nat.htm#b23-0000](http://www.bls.gov/oes/current/oes_nat.htm#b23-0000); U.S. DEPARTMENT OF COMMERCE, INCOME,



But society does not grant the privileges of professionalism, particularly the privileges of autonomy and self-regulation, to every occupation group that claims a knowledge base, specialized education, and norms. Instead, sociologists have found that the privileges of professionalism are earned only by those groups that effectively demonstrate their possession of three attributes: (1) the unique, abstract body of knowledge described *supra*; (2) skillful application of this knowledge base; and (3) application that assists those members of society who have encountered physical or moral problems that involve significant risks.<sup>29</sup>

The substance and logic of "The Law" certainly represent the unique and abstract body of knowledge that characterizes the legal profession. Understanding how to discern the rule of law—through discovery and close reading of relevant judicial opinions, statutes, rules, and other sources of law—and then skillfully applying the law to a new fact situation is what "thinking like a lawyer" is all about. People in trouble seek out lawyers to learn the relevant rule of law and what they are entitled to expect. Indeed, if lawyers were to abandon skillful legal analysis, particularly in a country guided (at least aspirationally) by the rule of law,<sup>30</sup> they would lose their unique ability to help the members of society caught in risky physical, financial, and moral situations navigate their way. Viewed from this perspective, lawyers' insistence on maintaining their focus on relevant legal principles in mediation is not just understandable but socially beneficial. Consistent with this, parties in court-connected mediation generally are more likely to perceive the process they have experienced as fair if the mediator (usually a lawyer-mediator) provides an assessment of the legal strengths and weakness of their cases.<sup>31</sup>

Lawyers and lawyer-mediators also are likely to spend substantial time in mediation on the "litigation and persuasion issues" that arise out of their unique and abstract knowledge base—e.g., the stages, evidence required, and cost of going to trial; the risks of losing particular issues; comparable jury verdicts and settlement amounts; the framing of particular points in order to increase the likelihood of persuading the other side to accept an offer or demand. In most cases, as long as the parties are or become willing to approach settlement from a rational and economic perspective, this information is likely to help them settle their cases

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POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005 4 (August 2006). Other professionals, such as physicians/surgeons (\$142,220 – 247,536), pharmacists (\$93,500) and dentists (General: \$140,950, All other specialists: \$108, 340) also earn significantly more on average than the national median income. U.S. Department of Labor, Bureau of Labor Statistics – [http://www.bls.gov/oes/current/oes\\_nat.htm#b23-0000](http://www.bls.gov/oes/current/oes_nat.htm#b23-0000).

29. See Welsh, *supra* note 17 at 494 (citing J. Birkhoff, *Mediators' Perspectives on Power: A Window into a Profession?* (2000) (Unpublished Ph.D. dissertation, George Mason University) (on file with author); ANDREW DELANO ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988); *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* (Gerald L. Geison, ed., 1983); *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* (Robert Dingwall & Philip Lewis, eds., 1983); and MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977).

30. See Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 692 (2007) (finding that the American public still holds high ideals for the rule of law, but they have a 'mild discontent' about the authorities living up to these ideals).

31. See Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 684 (2002).

and continue their lives or businesses.<sup>32</sup> By maintaining the primacy of “thinking like a lawyer” in mediation, the lawyers and lawyer-mediators have played a socially useful role and shown that they are entitled to the privileges of their profession.

But what about the cases in which the parties are emotionally-charged, reluctant to accept the lawyers’ and lawyer-mediators’ predictions, or morally opposed to settlement? Often, lawyers and lawyer-mediators simply return to their knowledge base—application of the law and related litigation and persuasion issues—to mine its logic a little more and emphasize the importance of risk management. Though they may be respectful and even kind, lawyers and lawyer-mediators are unlikely to deal with the resisting parties as human beings whose emotions, underlying psychological interests, or moral values need to be heard, acknowledged, and explored. Lawyers and lawyer-mediators may fear, quite understandably, that the parties would view such interventions as inconsistent with the professional identity and role of the lawyer.<sup>33</sup> More systemically, lawyers and lawyer-mediators may fear that using factors other than legal analysis and litigation and persuasion issues could make resolution more difficult,<sup>34</sup> thus undermining both the law’s claim to significance and the lawyer’s claim to professional autonomy and authority.

Lawyers’ focus on legal analysis is entirely consistent with meeting their obligations as professionals and their own self-interest in maintaining the attractive privileges of professionalism. It should not be surprising that lawyers prefer to continue “thinking like a lawyer” in court-connected mediation. The question is whether lawyers can maintain their professional privileges, role, and autonomy while also inviting the consideration of emotions, moral concerns, and underlying interests in appropriate cases (both within and outside mediation), particularly those in which “thinking like a lawyer” does not fully respond to parties’ needs.

#### IV. THE DEMANDS OF THE BUSINESS OF LAW

The demands of the business of law—both the demands of entering practice and the demands of practice itself—also may contribute to lawyers’ hesitation to expand their focus much beyond the law and “litigation and persuasion issues.”

There is substantial evidence that many students choose to enter law school because they see it as a way to earn a good living. In early studies, the percentage of students who entered with this motive varied from law school to law school.<sup>35</sup> More recently, research has revealed that male law students are more likely than female law students to value the potential to make money.<sup>36</sup> Even students who were not motivated to enter law school by the desire to make money, however, are likely to start focusing on the need for a substantial income as soon as they con-

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32. See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8:2 OHIO ST. J. ON DISP. RESOL. 235, 244-45 (1993) (explaining how analysis of potential losses and loss aversion can affect parties’ willingness to enter into settlement).

33. See Guthrie, *supra* note 24 at 166-70.

34. See Wissler, *supra* note 31 at 679 (reporting that general civil mediation cases were more likely to settle if mediators evaluated the case merits for the parties).

35. Daicoff, *supra* note 20 at 1358.

36. Daicoff, *supra* note 20 at 1360.

front the significant loans they will be required to re-pay as the cost of law school increases exponentially.<sup>37</sup>

Law students' and lawyers' need or desire for money is likely to influence how they understand their own value in the marketplace. Their knowledge of the law, rather than their ability or willingness to feel a human connection, is what they have to sell. The new lawyers who are insecure about their role in a firm and face the repayment of huge law school loans, as well as those new lawyers who expect a quick ascension to a high standard of living, may be particularly hesitant to add human or moral considerations to the technical advice that the firm or the client has requested.<sup>38</sup>

Increasingly, too, profit-maximizing considerations have led segments of legal practice to emulate corporate employment, making one-on-one, personal interaction with real, individual clients less likely and thus humanistic practice less attainable. A full 28% of new lawyers report that they work in large firms of more than 100 lawyers (including those with individual offices that are likely to house 20 or fewer lawyers) though only 8% of all lawyers report working in this setting. Another 38% of new lawyers and 27% of all lawyers work in small or mid-sized private firms of 2 to 100 lawyers. Solo practice, meanwhile, is very infrequent for new lawyers. Only 5% practice on their own, though 32% of all lawyers report that they are in solo practice.<sup>39</sup>

The goal of feeling like a lawyer who will be called upon to assist clients with human, moral dilemmas appears particularly difficult to achieve for new lawyers in the mega-firms, with 100 or more lawyers in a single office. Though only 18% of new lawyers and 8% of all lawyers actually work in this practice setting,<sup>40</sup> the money is best at these firms,<sup>41</sup> and they dominate many law students' and law schools' aspirations. The trends for this particular segment of the legal profession

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37. See Jonathan D. Glater, *High Tuition Rates and Low Pay Drain Public Interest Law*, N.Y. TIMES, Sept. 12, 2003 (reporting that ABA committee found that law students graduate with an average debt of \$77,300); John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 516 (2002) (describing the changes in tuition throughout the 1990s and difficulty students have in paying off law school loans); Data from the American Bar Association reveals that the average tuition for private law schools was \$7,526 in 1985; it was \$28,900 in 2005. The average non-resident tuition for public law schools was \$4,724 in 1985; by 2005, it had increased to \$22,987. The average resident tuition for public law schools was \$2,006 in 1985; it was \$13,145 in 2005. <http://www.abanet.org/legaled/statistics/charts/stats%20-%205.pdf>.

38. The Model Rules of Professional Conduct do not provide clear guidance to these new lawyers. See e.g., MODEL RULES OF PROF'L CONDUCT R. 2.1, cmt. 2 (2003) ("Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.") and cmt. 3 ("A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value.")

39. DINOVTITZER, *AFTER THE J.D.* *supra* note 21, at 27. Beyond private practice, 5% of new lawyers work for the federal government (compared to 6% of all lawyers), and another 14% work for state and local government, legal services and public defenders' offices (compared to 16% for all lawyers). See *id.* at 27.

40. See *id.*

41. However, this truism is tempered by the particular geographic market. See *id.* at 41.

have been described as the “‘industrialization’ of work.”<sup>42</sup> Among the new lawyers working in private practice, the new lawyers at mega-firms are most likely to work over 60 hours per week,<sup>43</sup> specialize (at least in terms of the percentage of time spent working in a particular area of law),<sup>44</sup> play “sometimes minor or routine roles in big, complex projects,” and be granted “strikingly lower levels” of trust and independence.<sup>45</sup> There also are more layers of hierarchy in these firms, and their governance and compensation patterns reflect an efficient, profit-oriented corporate ethic much more than a democratic partnership.<sup>46</sup> The new lawyers at these firms:

[T]end to report the highest levels of satisfaction on the power track measure, but they tend to express much less satisfaction [than new lawyers in other settings] with the other dimensions of their jobs [i.e., satisfaction with the substance of their work, satisfaction with their work environment, and satisfaction with the relationship between work and broader social issues]. . . . The relative dissatisfaction reported by associates [at large law firms] suggests that high salaries and a perception of strong prospects for the future are counterbalanced by the less desirable aspects of their current work environment.<sup>47</sup>

Based on this description, it is difficult to see how the mega-firm’s usual work or structure is likely to encourage new lawyers to move beyond a legalistic approach to the narrow issues for which they are responsible. Indeed, it would be easy to conclude that many of the mega-firms are mentoring their new recruits to value themselves primarily as well-paid technicians and calculating tools, rather than as independent and autonomous professionals who expect to engage regularly in relationships and service that is humanly, socially, and morally engaging.

Professor Joshua Rosenberg captured the tension well when he wrote recently about the potential of providing law students with the opportunity to focus on relationship skills:

I may be a slow learner, but after 20 years of teaching, I finally “got it.” I realized that spending three years telling law students about things like property rights, consideration, gross income or the commerce clause might get some of them high-paying jobs right out of law school, but it wasn’t going to make them either very good lawyers or very happy law-

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42. Milton C. Regan, *Jean Stefancic and Richard Delgado, How Lawyers Lose Their Way: A Profession Fails Its Creative Minds*, 55 J. OF LEGAL EDUC. 454, 460 (2005) (book review) (citing RICHARD POSNER, *OVERCOMING LAW* 63 (1995)).

43. DINOVTZER, *supra* note 21, at 34, 36.

44. *Id.* at 37. See also ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 285 (1983).

45. See DINOVTZER, *supra* note 21, at 34.

46. See Robert L. Nelson & Rebecca L. Sandefur, *From Professional Dominance to Organisational Dominance*, in *REORGANISATION AND RESISTANCE: LEGAL PROFESSIONS CONFRONT A CHANGING WORLD* (William Felstiner, ed., 2006); Julie Macfarlane, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 5 (2008) (noting the establishment of a second level of partnership with only limited rights).

47. DINOVTZER, *supra* note 21, at 48.

yers. Study after study shows that success in law correlates significantly more with relationship skills than it does with knowledge of substantive law, intelligence, writing ability, or anything else. Since success in law requires working well with colleagues, getting along well with clients, and being able to work well with judges, juries and opposing counsel, the importance of relationship skills may not be surprising. But law is not really unique in this respect. Relationship skills are the best indicator of future success not just in law, but in *every* profession. Not only are relationship skills important to *success* in law, but they are also the key to *enjoying* the practice of law. When asked what they like best about their work, lawyers almost always talk about relationships: "I like to help people;" or "Last week, a client told me that what I did for her made a big difference in her life;" or "I like being part of a team." On the other hand, when asked what they dislike most about work, the number one complaint is not the long hours, but their work *relationships*. They often feel at best disregarded, and at worst abused, by their own partners and co-workers; and they feel isolated, abandoned and overwhelmed by stress and conflict. Yes, high salaries are wonderful things; but they don't really help lawyers like their work, they only keep lawyers working in the jobs they dislike.<sup>48</sup>

The potential to feel like a lawyer may be stronger for those new lawyers who work in smaller practice settings, whether public or private. They tend to have less visibility than those in the mega-firms, as well as lower incomes.<sup>49</sup> However, they also assume greater responsibilities, enjoy greater autonomy and express greater satisfaction with the substance of their work, its social value, and their practice environment.<sup>50</sup> Perhaps these lawyers have chosen to trade a higher income and status for the luxury of being able to use their analytical skills, connect with their clients, and identify as civic professionals.

Money, though, remains an important consideration that has the potential to reduce even the solo practitioner's ability to approach practice humanistically. The lawyers in small plaintiffs' firms, for example, must be excellent business people in order to make their legal services affordable yet financially viable—e.g., doing cost-benefit analyses in deciding whether or not to take cases, maintaining a sometimes-overwhelming book of business, efficiently delegating tasks to junior lawyers and para-professionals, achieving diversification to maintain lines of credit at banks.<sup>51</sup> And, of course, the realities of contingency fee practice may result in a divergence between the lawyers' financial interests and their clients' preferences as they consider settlement offers.

Beyond considering the expectations and economics of legal practice settings, what do clients expect from lawyers? On one hand, there is evidence that both

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48. Email from AALS Dispute Resolution List on behalf of Joshua Rosenberg, to AALS-ADR-L@PO.MISSOURI.EDU (Oct. 18, 2006).

49. DINOVIETZ, *supra* note 21, at 34, 43.

50. *Id.* at 48.

51. See Stephen Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. OF EMPIRICAL LEGAL STUDIES 943 (2004) (regarding how personal injury plaintiffs' lawyers need to manage their business).

individual and corporate clients appreciate lawyers who show that they care, communicate well and are committed to helping their clients through difficult times.<sup>52</sup> This seems to call for a lawyer who is ready to shoulder the humanistic and ethical responsibilities of a civic professional. On the other hand, good communication and caring take time, and many clients do not want to (or cannot) pay as much as many lawyers would like to (or must) charge for their services and time. In addition, there is evidence that clients expect lawyers to be smart, knowledgeable, and dominant. They are much less likely to expect care and compassion.<sup>53</sup> Finally, there seems to be plenty of circumstantial evidence that some high-profile clients see lawyers primarily as technicians whose value derives from their knowledge of how to use the letter of the law—and avoid its spirit.<sup>54</sup> For these clients, a lawyer's desire to consider human and moral impacts could be perceived as a liability.

The business of entering and practicing law, with its monetary and competitive pressures, may be another potential factor in many lawyers' reluctance (or practical inability) to spend precious time attending to the human elements of law.

## V. THE ROLE OF LEGAL EDUCATION

Legal education, with its current primary focus on "thinking like a lawyer", reflects and reinforces the dominant psychological profile of its students, the desire of the legal profession to sustain its privileges, and the business of legal practice. Importantly, legal education's focus on logic, rules, and standards also serves an important social purpose.

Should legal education also try to help students care about *feeling* like lawyers? Should we prepare our students to make meaningful—and sometimes difficult—human connections as they provide legal services to people caught in significant physical, moral, and financial dilemmas? Should we help them learn how to care for themselves as they make such connections? Will law students value such education? Will it be effective? Will it be confusing?

I do not know the answers to all of these questions. I do know, however, that other professional schools are incorporating the development of "emotional intelligence" into their curricula,<sup>55</sup> researchers are exploring the revision of law school

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52. See ROBERT F. COCHRAN, JOHN M.A. DIPPIA & MARTHA M. PETERS, *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 58-59 (1999) (citing Stephen Feldman & Kent Wilson, *The Value of Interpersonal Skills in Lawyering*, 5 *Law & Hum. Behav.* 311 (1981)); Jenny B. Davis, *What I Like About My Lawyer*, 39 *A.B.A. J.* 33-36 (2003).

53. See Guthrie, *supra* note 24, at 166-69.

54. Consider the scandals at Enron and Hewlett-Packard involving lawyers, as well as the government lawyers who used legalistic interpretations of the law to justify U.S. use of torture and unauthorized wiretapping. See Michael Hatfield, *Fear, Legal Indeterminacy, and the American Lawyering Culture*, 10 *LEWIS & CLARK L. REV.* 511, 525 (2006) (arguing that the "idea of working as a hired gun to do the client's bidding . . . is the practical consequence many law students draw from vocational education in an academic environment that not only admits but is fascinated with legal indeterminacy.").

55. For example, at Penn State University's Smeal College of Business, the Teams course for both resident and executive MBAs includes specific focus on emotional intelligence. More generally, the course helps students to build their emotional intelligence and leadership skills through work in teams, assisted by faculty-provided coaching and career development work as well as 360 degree and team feedback. See Email from Barbara Gray, Professor of Organizational Behavior, Smeal College of

admissions practices to include consideration of humanistic factors that predict effective lawyers,<sup>56</sup> and the Carnegie Foundation for the Advancement of Teaching has highlighted the law schools that are trying to assist law students in connecting legal conclusions “with the rich complexity of actual situations that involve full-dimensional people.”<sup>57</sup>

There is also evidence that at least some lawyers and law students are eager to look down a new road. Professor Joshua Rosenberg reports, for example, that he now offers a course entitled “Interpersonal Dynamics for Attorneys,” and nearly all of the students who have taken it have concluded that it is “the ‘single most useful course’ they have ever taken, at any school.”<sup>58</sup> Professor Julie Macfarlane has pointed to the increased popularity of dispute resolution programs in law schools, the increased use of mediation in litigated matters, the culture change that has occurred within some legal communities in response to court-connected mediation, and the rise of Collaborative Law as signs of the emergence of a “new lawyer.”<sup>59</sup> Some corporate general counsel are signaling the need for lawyers to provide wise counsel as well as legal advice.<sup>60</sup> A recent survey of sophisticated repeat users of mediation found that they value mediators’ understanding of the

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Business, Penn State University, to Nancy Welsh (Dec. 8, 2007) (on file with author). The Accreditation Council for Graduate Medical Education, meanwhile, now includes both interpersonal and communication skills and professionalism among its six core competencies for clinical residency training programs. See Federation of State Medical Boards, Special Committee on Maintenance of Licensure, Draft Report 9, available at <http://www.fsmb.org/pdf/Draft%20report%20FSMB%20Special%20Committee%20on%20Maintenance%20of%20Licensure.pdf> (last visited January 1, 2008). See also Joshua Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1235 (2004) (referencing a course on interpersonal dynamics taught at the Stanford University Graduate School of Business).

56. Professors Marjorie M. Schultz and Sheldon Zedeck are the principal investigators for the Law School Admission Project: Looking Beyond the LSAT. To date, and with the assistance of more than 2,000 alumni of Boalt, they have identified the following 26 lawyering effectiveness factors: analysis and reasoning, creativity/innovation, practical judgment, researching the law, passion and engagement, questioning and interviewing, influencing and advocating, writing, speaking, integrity/honesty, ability to see the world through the eyes of others, self-development, organizing and managing others, negotiation skills, networking and business development, building client relationship including advice and counsel, organizing and managing own work, developing relationships, evaluation/development/mentoring, problem solving, stress management, fact finding, diligence, listening, community involvement and service, and strategic planning. See <http://www.law.berkeley.edu/beyondlsat/> (last visited Dec. 30, 2007).

57. Summary: WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW*, The Carnegie Foundation for the Advancement of Teaching, at 6, available at [http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers\\_summary.pdf](http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers_summary.pdf).

58. Rosenberg, *supra* note 55 at 1234.

59. See JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 16-24 (2008). See also Julie Macfarlane, *What Does the Changing Culture of Legal Practice Mean for Legal Education?*, 20 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 191 (2001); Julie Macfarlane and John Manwaring, *Using Problem-Based Learning to Teach First Year Contracts*, 16 J. OF PROFESSIONAL LEGAL EDUCATION 271 (1998); John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003).

60. See Ben W. Heineman, Jr., *Caught in the Middle*, Corporate Counsel, April 1, 2007, available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1173949428722> (former senior vice president-general counsel of GE talks about the need for general counsels to have integrity and not just focus on the business side of things, but be wise counselors for their corporations).

parties' interests, as well as the legal issues.<sup>61</sup> Lawyers who have taken mediation training often observe approvingly that they plan to transfer the listening skills and interests-oriented approach they have learned to their relationships with their clients and their legal counseling.

These encouraging developments suggest that both thinking and feeling like a lawyer<sup>62</sup> can enable lawyers to identify issues in a variety of useful ways—in terms of legal analysis and litigation issues, but also in terms of human and ethical needs, including many clients' emotional and psychological need to experience something that feels like justice when they meet with their lawyers. These developments also suggest that despite the significant psychological, professional, and business hurdles identified in this essay, a growing number of lawyers are searching for constructive means to bring a caring, humanistic element to their practices. Perhaps Robert Frost will be proven wrong—or perhaps he could just not see far enough down that road in the woods. Perhaps in choosing one road, we do not need to leave the other behind forever. Perhaps we can find our way toward the convergence of the two roads—thinking *and feeling* like a lawyer.

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61. See John Lande & Rachel Wohl, *Listening to Experienced Users: Improving Quality and Use of Commercial Mediation*, 13 DISP. RESOL. MAG., Spring 2007, at 19.

62. Robert H. Mnookin, et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOT. J. 217 (1996).